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• Sectional Title Ombudsman



DEPARTMENT: LAND AFFAIRS
CHIEF REGISTRAR OF DEEDS

- Revision of the Deeds Registries Act and other Legislation relevant to Land Registration in South Africa
- SARS launches a new Electronic Transfer System

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DISCLAIMER

- The views expressed in the articles published in this journal do not bind the Department of Land Affairs and the Chief Registrar of Deeds. The Chief Registrar of Deeds does not necessarily agree with the views of the contributors.

The review of the Deeds Registries Act 47 of 1937 and the Sectional Titles Act 95 of 1986 is in full swing (see the article on page ...). Furthermore, the submission to the Minister for the Ombudsman is also reaching the stage of the first draft of the proposed legislation (see article on page ...).

It is a fact that we are living in interesting times. We shall apply the new Act governing land transactions in the new South Africa. I doubt whether any person still working in the deeds office or a member of the profession was involved in enacting the Deeds Registries Act of 1937.

Some time ago I was asked by a member of staff to provide advice on how to update the title deed of a person who underwent a sex?change. Obviously, my answer was that the legislature in 1937 never anticipated that something like that would ever occur and thus no provision for such occurrence exists. However, our existing Deeds Registries Act, being as adaptable as it is, could provide for such an act of registration. Section 3(1)(v) of the Act could thus be invoked to record the change in gender.

Having said the above, when reviewing the Act, provision will have to be made for all possible situations, so that in 70 years' time no one will be able to say that the legislature did not anticipate this or that.

The editorial committee reviewed all the articles submitted for the March edition and unanimously chose the article by Tania Shawe on the Promotion of Administrative Justice Act 3 of 2000 as the best contribution for March. The editorial committee would like to extend its congratulations to Ms. Shawe. Unfortunately Tania has left the Deeds Registry of Pietermaritzburg and we all wish her prosperity in her newly chosen career.

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Sectional Titles Ombudsman

By: Joseph Maluleke - Conveyancer, Rooth and Wessels

At the beginning of last year, the Department of Agriculture and Land Affairs (the Department) invited proposals from suitably qualified persons to act as lead consultants to assist in the creation of new legislation that will:

- Æ deal with the administration and management of sectional titles; and
- Æ provide appropriate dispute resolution structure(s) for sectional title consumers.

This was the result of a recognized need for the creation of a structure to address consumer issues arising from sectional title tenure. To the people who work with this form of tenure or live within sectional title schemes, this is a long-awaited piece of legislation they require. The dispute resolution mechanisms currently available to sectional title consumers are ineffective in practice. Access to the courts to resolve sectional title disputes is too expensive and time-consuming. The arbitration provision inserted into the management rules prescribed by the Sectional Titles Act 95 of 1986 has not provided a viable alternative.

It is against this background that the Department appointed a consortium under Graham Paddock & Associates to conduct investigations into a Sectional Titles Ombudsman service or other dispute resolution system.

The lead consultants of this consortium are Prof. Cornelius van der Merwe, Graham Paddock, who is also the project manager, and the author. Various sub-consultants and other experts will also be involved.

Prof. Van der Merwe is currently a professor of Civil Law at the University of Aberdeen. He has served as President of the South African Society of Teachers of Law, President of the South African Committee of the International Academy of Comparative Law and as Dean of the Faculty of Law of the University of Stellenbosch. Prof. Van der Merwe is an internationally recognized expert on 'apartment ownership' and all the various types of 'condominium', 'strata titles' and sectional title laws. He is the author of the leading academic text on sectional titles, 'Sectional Titles'

(Volume 24 of Butterworth's 'Law of South Africa').

Graham Paddock is a Cape Town conveyancer who specializes in all aspects of sectional titles. The author is a Pretoria conveyancer, specialising in property law and sectional title transactions.

As already mentioned, the brief includes drafting new legislation dealing with the management and administration of sectional title schemes. This project is part of an initiative by the Department to review and revise all South African legislation dealing with land registration.

Sectional title legislation, originally brought into force in 1973, was substantially revised in 1988 and further amended in 1997. The resolution of sectional title disputes has become an increasing problem. The provisions made in 1997 to deal with sectional title disputes have not provided an effective solution.

This initiative will result in 'third generation' sectional title legislation. We have been briefed to do an extensive survey of similar foreign laws, to draft proposals, legislation and regulations as well as explanatory memorandums and to assist in the process of implementing the new laws. Appropriate forums will be put in place for the purposes of obtaining input from a range of stakeholders, including government departments and representative bodies as well as the general public.

Revision of the Deeds Registries Act and other legislation relevant to Land Registration in South Africa

By: A S West - Deeds Training, Pretoria | **Republished with permission from De Rebus**

There is much to be said for a Deeds Registries Act that has endured since 1937, sculpted with a few nips and tucks over the decades. It is well documented that our land registration system is regarded as one of the most robust and trusted land registration systems in the world. However, times have changed and the system of land registration is faced with challenges like never before.

In recent times, and especially since 1991, local and international trends have evolved at such a pace that new and varying demands are continuously being placed on our land registration system. The present registration system provides for 6.4 million land parcels and Deeds Office resources are already facing challenges. With a R6 billion land reform budget announced by the Minister of Finance on 23 February 2005, land parcels are expected to reach 20 million soon.

The Department of Land Affairs has embarked on a project to review and amend the land registration regulatory framework (primarily the Deeds Registries Act and Sectional Titles Act) to facilitate increased volumes and to become aligned with modern thinking, demands, processes and practices. The Department's primary objective is to maintain a land registration regulatory framework, which facilitates an efficient, reliable, transparent and affordable land registration system.

This current project has identified various areas of potential improvement of the regulatory framework, including:

- removing barriers to processing increasing numbers of registration;
- realignment of the cadastre, surveying practice and other related technical/professional functions, including laws relevant to spatial planning, land use, rights in respect of land, sea and seashore;
- decentralization of services to effect delivery at the point of need and adoption of the public sector prescribed batho pele principles in service delivery, including demystifying land registration processes;
- consolidating disparate legislation and avoiding legislative overlap by ensuring the autonomy of the Department of Land Affairs in respect of land registration procedures;
- recognition and accommodation of new forms of land tenure; and
- employing technology to increase efficiency and ultimately to reduce costs

In respect of facilitating a more expedient registration process, various options will be explored, including:

- Electronic lodgement of deeds through robust verification and security interfaces between conveyancers and the relevant Deeds Offices;
- Removing information from applications not strictly necessary for purposes of the land register;
- Allowing deeds to be filed with the relevant Deeds Offices from anywhere in the country;
- Allowing data capturing to take place prior to or as part of lodgement to avoid recapturing delays after registration;
- Facilitating examination procedures by electronic means;
- Finding means to obtain confirmation of tax and municipal clearances more expeditiously.

Consultation will take place with legal fraternity and other stakeholders throughout the project. After preparation of a first draft Bill, the Department will invite all stakeholders to make comments and proposals for improvement before the Bill is finalized.

From a legislative perspective, a distinction must be made between administration and policy. The Deeds Registries Act and Sectional Titles Act are the primary legislative instruments governing the land administration process. Land administration is not land reform. The new regulatory framework would focus on facilitating an efficient administration process, which would facilitate land reform.

Some fundamentals of the present system are unlikely to change in any new legislative dispensation. For example, the existing law does not guarantee title to land and other real rights. It is not envisaged that the new dispensation would deviate from this principle. The collective challenge facing the government and conveyancers is to ensure that the system retains its non-guarantee status, while upholding the same levels of reliability (or more).

The Surveyor General, Registrar of Deeds and conveyancers are joint custodians of the integrity of the land registration system. While all stakeholders will be engaged in the project, it is hoped that conveyancers will support the objectives pursued and assist in formulating a new land registration regulatory framework that can address existing and future challenges.

SARS launches a new Electronic Transfer System

By: A S West - Deeds Training, Pretoria

The South African Revenue Service (SARS) has launched a new transfer duty system that will enable conveyancers to access and submit declaration forms electronically on the net.

The initiative is aimed at improving client service, modernising SARS processes and ensuring easy compliance with all tax laws.

The transfer duty declarations, REV 683, REV 684 and VAT 249 have been revised and redesigned and the new declaration forms (TD 1, 2, 3, 4, 5, 6 and 7) are already available on the SARS website.

These forms must be used for all transactions concluded on or after 01 May 2005.

From now on, conveyancers will be able to submit transfer duty declaration forms and effect transfer duty payments electronically once they have registered as e-filers on the SARS website.

The conveyancers will need to scan copies of the deeds of sale and submit them with the declarations signed electronically on behalf of the buyer and seller. The scanned copies would then have to be submitted electronically to a SARS office closest to where the property is situated.

This would then enable SARS to authorize the issuing of transfer duty receipts or exemption certificates and provide for the extraction of such receipts or exemption certificates.

From a deeds registration point of view, the Chief Registrar of Deeds, in the Chief Registrar's Circular 6 of 2005, provided the following practice and procedure pertaining to electronic transfer duty receipts:

IMPLEMENTATION OF ELECTRONIC SYSTEM

The South African Revenue Services ("SARS") has implemented a system whereby conveyancers will be able to submit transfer duty declarations and effect transfer duty payments electronically via the Internet.

This system enables SARS electronically to authorize the issuing of transfer duty receipts or exemption certificates from the SARS website.

COMING INTO OPERATION OF ELECTRONIC SYSTEM

The new system came into operation on 1 May 2005. With effect from 1 May 2005, deeds offices must accept transfer duty receipts and exemption certificates extracted electronically from the SARS website for registration purposes (see examples attached). The 'old' transfer duty receipts may, however, still be accepted for the purposes of registration during the transitional period (see paragraph below).

VERIFICATION OF TRANSFER DUTY RECEIPTS

In order to verify a transfer duty receipt or an exemption certificate that has been extracted from the SARS website, deeds registries must call for a certificate upon the lodgement of such a receipt or exemption certificate. A certificate in the above-mentioned regard must be made on the transfer duty receipt or exemption certificate and must read along the following lines:

"Verification of Transfer Duty Receipt / Exemption Certificate

I, *..... hereby certify that this is a true copy of transfer duty receipt number/exemption certificate number **..... that has been extracted from the SARS website (e-filing only).

DATE: CONVEYANCER/NOTARY/COMMISSIONER OF OATHS

* Insert full name of Conveyancer/Notary/Commissioner of Oaths

** Insert transfer duty receipt number / exemption certificate number

SARS has provided the above-mentioned wording for conveyancers and attorneys to be entered on the

electronic receipts and exemption certificates. It must, however, be noted that the certificate must be issued by a conveyancer, notary or commissioner of oaths.

It must be noted that SARS will also issue 'new' transfer duty receipts manually. A 'new' transfer duty receipt that has been issued manually must contain an endorsement from SARS as well as a cash register receipt.

'New' transfer duty receipts that have been issued electronically must contain the certificate as referred to supra.

TRANSITIONAL PERIOD

SARS has provided for a transitional period during which 'old' transfer duty receipts will still be issued. SARS, however, will discontinue the issuing of 'old' transfer duty receipts in respect of transactions entered into on or after 1 May 2005. This means that 'old' transfer duty receipts may not be accepted for registration purposes, in respect of transactions which were entered into on or after 1 May 2005.

FORMAT AND INFORMATION ON TRANSFER DUTY RECEIPTS

Transfer duty receipts drawn off the SARS website will be in the format of a TD2 (Part 2), TD5 (Part 2), or TD6 document. The TD2 relates to a transfer duty receipt/exemption certificate with the purchase of immovable property. The TD5 (Part 2) document relates to a transaction that is subject to VAT and thus exempt from transfer duty. The TD6 document is an annexure.

In order to accommodate SARS in the electronic issuing of transfer duty receipts and exemption certificates, it was agreed upon between SARS and the Chief Registrar of Deeds that full details of the transferor, transferee and property description do not have to be reflected in TD2, TD4 and TD5 documentation. The information in the TD2, TD4 and TD5 documentation must, however, always be capable of being identifiable with the transaction it relates to. It is not necessary for the marital status of parties to be referred to in a TD2, TD4 and TD5 docu-

ment. Where parties are married in community of property, the name of both the husband and the wife must be referred to. Based on the current format of the new transfer duty documentation, the details of the husband and wife will appear as separate parties. Abbreviations may also be used in TD2, TD4 and TD5 documentation.

Where a transaction relates to the registration of a servitude, a short description of the servitude must be referred to in the space provided for the property description.

Examiners must note that the provisions of Regulation 34(4) of Act No. 47 of 1937 must be adhered to in that the names of all the members of a firm or partnership must be referred to in respect of transactions in which a firm or partnership is a party.

Minor errors with regard to the description of a transferor, transferee and property description in TD2, TD4 and TD5 documentation may be rectified by means of a certificate by a conveyancer, or by the person who has signed the relevant certificate (see paragraph 3 above). Where a material amendment to the transfer duty receipt is required, such an amendment must be affected and endorsed by SARS. Furthermore, no certificate may be accepted for the purposes of correcting any errors relating to the consideration and calculation of transfer duty/VAT in TD2, TD4 and TD5 documentation. Errors with regard to the consideration and calculation of transfer duty/VAT in TD2, TD4 and TD5 documentation must be referred to SARS for amendment and endorsement.

Where insufficient space is provided for in the TD2, TD4 and TD5 documentation for the description of the parties or property description, an Annexure (TD6) with the same receipt number as the TD2, TD4 and TD5 document to which it relates, must be attached and duly verified for purposes of registration.

Section 15B(3) of the Sectional Titles Act and the examination of deeds

By: George Tsotetsi - Office of the Chief Registrar of Deeds

Paragraphs (a) and (b) of Section 15B(3) of the Sectional Titles Act, 95 of 1986, were substituted by Section 10(a) of Act No. 44 of 1997. The writer has, however, observed that some examiners and some conveyancers presently misinterpret these provisions. This article is intended to clear up the misconceptions surrounding the application of these provisions.

In dealing with this matter, paragraph (a) will first be discussed, and then paragraph (b).

Subparagraph (a)(i), which protects the interests of the body corporate, places an injunction on the Registrar of Deeds not to register a transfer of a unit unless a conveyancer's certificate confirming certain facts has been lodged.

It is imperative at this stage to determine what the word "certificate" in this section means. The word "certificate" in the section refers to a formal document attesting a fact. In this regard, see the ninth edition of The Concise Oxford Dictionary on page 241. In other words, a certificate must relate to a factual position.

Subparagraph (a)(i)(aa) is framed in the alternative and provides as follows:

'If a body corporate is deemed to be established in terms of Section 36(1), that body corporate has certified that all monies due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.'

The question that then arises is: What is the responsibility that is placed upon the conveyancer by this subparagraph? The answer to this question is quite simple and is that the conveyancer must firstly confirm whether a body corporate is in existence or not and secondly whether the said body corporate, if in existence, has certified that all monies due by the relevant transferor have been paid or that satisfactory provision for the payment thereof has been made. In other words, the conveyancer's certificate should confirm one or the other of the above cases, as they are mutually exclusive. The intention of the legislature

was, and still is, to enable the body corporate to accept guarantees in appropriate cases and not to permit certificates that actually do not certify anything, as is presently the practice with many conveyancers. The following examples of certificates indicate a proper application of this subparagraph:

1. 'I, xyz conveyancer, certify that a body corporate of abc scheme is in existence and that the said body corporate has certified, as at date of registration, that all monies due to it by the transferor of section 1 have been paid.
2. 'I, xyz conveyancer, certify that a body corporate of abc scheme is in existence and that the said body corporate has certified, as at date of registration, that provision, to its satisfaction, has been made for the payment of all monies due to it by the transferor of section 1.

It must, however, be categorically stated that the framing of the relevant certificate by a conveyancer in the alternative, as is normally the case, though inappropriate, does not justify a rejection of the relevant transaction.

However, in their certificates, some conveyancers simply repeat the wording of the section. In doing so, there is nothing that they really certify because it is necessary categorically to certify the existence, or otherwise, of the body corporate. This way of formulating a certificate warrants its rejection.

Some certificates are worded as follows:

"A body corporate in respect of the aforesaid scheme is deemed to be established and accordingly monies are payable."

This manner of formulating a certificate, though the existence of the body corporate is appropriately dealt with, is not acceptable because the issue of the due payment of monies is not dealt with. This manner of formulation, naturally, warrants an outright rejection of the said certificate.

Does the certificate by the conveyancer absolve the examiner from verifying the issue of the existence, or otherwise, of the body corporate? In view of the provisions of Section 3(1)(b) of the Deeds Registries Act 47 of 1937, the answer is an emphatic "No". It must be stated that the writer has observed certificates that state that there is no body corporate in existence while in fact a body corporate is in existence. It is without doubt that such certificates warrant an outright rejection.

Subparagraph (a)(i)(bb) provides as follows:

'If a body corporate is not deemed to be established, no monies are payable.'

Here the conveyancer is, once again, expected to certify that a body corporate is not in existence. Once again the examiner is not absolved from verifying the existence, or otherwise, of the body corporate. The examiner should, naturally, reject a certificate that states that there is no body corporate in existence when there is one. Where there is no body corporate in existence, does the matter then end there? The answer to this question is a simple "no". In this instance the provisions of Subparagraph (b)(ii) become operative. The question, however, is: Whose responsibility is it to determine whether the relevant transfer will result in the establishment of the body corporate or not? The answer to this question is simply that it is the examiner's responsibility to determine the issue.

The reason for this proposition is that subparagraph (b)(ii) is not part of the conveyancer's certificate, despite the fact that many conveyancers think it is. It must be noted that it is only paragraph (a) that deals with a conveyancer's certificate. In the determination, an examiner must naturally be guided by Section 36. It is important to note, however, that where a co-developer transfers a section to another co-developer, such a transfer can never result in the establishment of a body corporate because a body corporate comes into existence only when a section is transferred to a person who is not a developer.

Subparagraph (a)(ii), which protects the interests of a purchaser of a unit, places an injunction on the registrar of deeds not to register a transfer of a unit unless a conveyancer's certificate confirming certain facts relating to the existence, or otherwise, of a right

of extension has been lodged. **Subparagraph (a)(ii) is also formulated as an alternative and provides as follows:**

'No real right of extension of a scheme as contemplated in Section 25 is registered in favour of a developer or the body corporate or, if such right is so registered, that it is disclosed in the deed of alienation to the transferee as contemplated in Section 25(14) or, if it is not so disclosed, that the transferee after the conclusion of the deed of alienation has in writing exercised his or her option in terms of section 25(15) and that he or she has elected not to annul the alienation on the ground of the said defect.'

The responsibility of certifying the existence or otherwise of a real right of extension clearly lies with the conveyancer. However, in terms of Section 3(1)(b) of the Deeds Registries Act, an examiner is still expected to verify this fact.

If no real right of extension has been registered, a conveyancer's certificate must just disclose that fact and nothing more. If such a right has been registered, a conveyancer's certificate must disclose such a fact and must then deal with the aspect of disclosure in the deed of alienation. If no disclosure has been made in the deed of alienation, a conveyancer's certificate must indicate that the transferee has, in writing, elected not to annul the alienation. It must be noted that the positions referred to above are mutually exclusive. In other words, it is either the one or the other.

Some conveyancers, however, merely repeat the wording of the section in their certificates and such a manner of formulation does not certify anything and warrants an outright rejection. Some conveyancers would certify that there is no right of extension reserved while, in fact, such a right has indeed been registered. This also warrants an outright rejection. Other conveyancers would certify that a right of extension has been registered and that it was disclosed in the deed of alienation, whereas no such right was ever registered. In this instance the deed must be passed because the rights of the transferee are not adversely affected. This must, however, not be seen as an encouragement of certification in respect of untrue statements.

The importance of the examiner verifying the existence, or otherwise, of the right to extend cannot be

Exclusive use areas - A Better Procedure?

By: J.O. Christie - Conveyancer, J Leslie Smith and Co Inc.
PIETERMARITZBURG
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over-emphasised. It often happens that the office records do not indicate the registration of a right of extension whereas such a right has indeed been registered and is still operative. An operative right is one which has not lapsed by effluxion of time or the completion of phased development. If an examiner finds out that such a right exists, then the relevant deed must be rejected, irrespective of the fact that the office records indicate otherwise. It often happens that the office records would still indicate the registration of such right while the said right is no longer operative, either because too much time has passed or because phased development, as per the reservation, has been completed. In this instance, irrespective of how the certificate is formulated, rejecting the relevant deed is not justified because the rights of the transferee can never be adversely affected.

It is clear, from what has been said above, that verification by an examiner is indispensable and can assist an examiner in making correct decisions.

Paragraph (c) finds application only in cases where a developer is the transferor. It is up to the examiner to determine whether the transferor is a developer or not. In most cases it is easy to determine this fact, that is, in those cases in which the title deed is a certificate of registered sectional title. It must be noted that a developer could still be the registered owner under a title deed that is not a certificate of registered sectional title, for example, a rectification transfer or an ordinary deed of transfer. It is the writer's submission that the developer would remain the developer, irrespective of the nature of the title deed under which she or he is the registered owner and that this paragraph ought to be applied accordingly.

Conveyancers and examiners are requested to air their views with regard to this topic and correct the flaws of the writer, if any.

Lastly, it is hoped that this article has achieved its purpose and that the parties concerned will view it in the spirit of collegiality.

The procedure for dealing with exclusive use areas (EUAs) in terms of Section 27 of the Sectional Titles Act 95 of 1986 (the Act) is cumbersome, costly and can be very time-consuming. The purpose of this article is to highlight some of the problems and disadvantages inherent in the present system and to suggest a better method for dealing with them. The proposal, if implemented, would necessitate minimal changes to the Act and/or regulations but would result in a cheaper, quicker and better registration procedure while retaining all the advantages of the present system.

At present EUAs are dealt with in one of two ways; either by delineation on the sectional plans in terms of Section 27 of the Act, the issuing to the developer of a certificate of real right followed by notarial deeds of cession; or in terms of the rules of the body corporate (usually the management rules) in terms of Section 27A of the Act.

EUAs incorporated into the management rules of the body corporate in terms of Section 27A can be amended only by unanimous resolution of the members of the body corporate.

The proposals in this article deal mainly with EUAs delineated in terms of Section 27.

As EUAs are quasi-personal servitudes and are entirely creatures of statute, there is no reason why certain of the procedures for dealing with them cannot be changed. EUAs in terms of Section 27 encompass all the features of personal servitudes but can be freely ceded to the owner of any unit in the scheme. It is clear from a careful reading of Section 27 that no EUA may be ceded to any person who is not the owner of a unit in the scheme.

Some of the problems and disadvantages with the procedures for dealing with EUAs in terms of Section 27:

- An additional and unnecessary act of registration (the notarial deed of cession) is required and presents a problem for conveyancers who are not also admitted as notaries public or who practise in firms which do not employ a notary public. These

firms are obliged to instruct another firm of attorneys which employs a notary public to execute the notarial deed of cession on their behalf.

- The cession adds to the costs of transfer of every unit where an EUA is involved.
- EUAs can be difficult to trace. Historically they were not always recorded against the property or person on the Deeds Office computer database. Where they were recorded, they are or were not always linked to the unit or to the owner concerned. This presents problems for conveyancers, estate agents, banks and the general public in trying to determine or trace the existence or ownership of EUAs. Transferring a unit in a sectional scheme therefore invariably requires a search both of the Deeds Office computer records as well as the plan and main file of the scheme in the Deeds Office. Practitioners practising at the seat of the registry will be aware of the daily searches done for practitioners practising away from the seat of the registry in order to ensure, inter alia, that they do not transfer or mortgage a unit without the EUA relating thereto. These continual searches incur unnecessary costs, are time-consuming and result in substantial wear and tear of the Deeds Office plan and main files for most of the sectional schemes.
- EUAs need to be disclosed on transfer duty receipts and on miscellaneous certificates, sometimes resulting in rejection queries by the deeds office. As the Act provides that EUAs can be held only by the owner of a unit in the scheme, there is no logical reason for requiring a separate title for the EUA. Moreover, as there is no prescribed format for the cession of EUAs by notarial deed or, indeed, the description of an EUA in a notarial deed of cession, there is no uniformity in the documents lodged for registration as these differ from notary to notary. Consequently queries raised by the Deeds Office in connection with EUAs often result in unnecessary delays in the transfers of units to which they are linked.
- Where an EUA has been overlooked for some or other reason at the time of transfer of the unit, Section 27(4)(b) provides that the EUA vests in the body corporate. Rectifying this omission by ceding the EUA from the body corporate requires a unanimous resolution of the members of the body corporate, which can be time-consuming and costly. Where such a cession is registered, the EUA will not be subject to any bond registered

simultaneously with the transfer of the unit. A collateral bond over the EUA may be necessary, resulting in further expense.

- EUAs are often omitted in error from agreements of sale, particularly by estate agents, resulting in queries from the Receiver of Revenue and ultimately a delay in the registration of transfer of the unit and, on occasions, the transfer of a unit without the EUA.
- EUAs result in an owner always having at least two holding deeds. When those deeds are lost or destroyed, a separate application needs to be made for the missing deed of transfer as well as the missing cession of EUA, resulting in more expensive advertisements in terms of Regulation 68 and liability for two Deeds Office registration levies (at present R225,00 per lost deed).
- Major problems often occur where the boundary or floor area of a section is extended in terms of Section 24 and where such an extension encroaches upon or reduces the area of an EUA. Where this occurs, it becomes necessary for the EUA to be cancelled by notarial deed between the body corporate and the owner of the unit. This requires a special resolution of the body corporate to cancel the EUA and a unanimous resolution of the body corporate in order to cede the amended EUA to the owner. A transfer duty receipt or exemption receipt must be lodged with such cessions. These requirements can be exceedingly costly and problematic, especially where large schemes are involved. It seems overly pedantic to require an owner who has, under the authority of a special resolution of the members of the body corporate, extended his section, to now have to go through the procedure of cancelling the existing EUA and taking cession from the body corporate of a reduced EUA, which requires a unanimous resolution.
- Where EUAs are delineated on the sectional plans by unanimous resolution of the body corporate, there is nothing in the Act providing for the issue to the body corporate of a certificate of real right for those EUAs, as is done where a developer reserves the EUAs. The EUAs are merely ceded off the sectional plan in much the same way as erven are transferred off a general plan. This procedure is highly unsatisfactory and likewise always requires a search to be conducted of the deeds office records before the relevant conveyancing documentation can be prepared with any degree of confidence.

A better solution

The general principles of delineation and reservation of EUAs as well as the concept and flexibility of being able to cede EUAs by notarial deed should be retained. The proposal, however, is that EUAs should be treated as conditions of title by incorporation into, or endorsement against, the holding title of the relevant unit, as is the procedure with other servitudes and with leases. Once an EUAs has been endorsed against the holding title, it will thereafter simply be carried forward as a condition of title in future transfers of the unit. Alternatively, the prescribed form for a transfer (form H) could be amended to include a paragraph dealing with EUAs in order to ensure uniformity in the description of EUAs.

Where the holder of an EUA desires, for any reason, to transfer the EUA to the owner of another unit in the scheme, this can then be done by notarial deed. The transferor's holding title will simply be endorsed to record the transfer of the EUA to the other party while the transferee's title will be endorsed accordingly.

Where the boundaries or the floor area of a section have been extended in terms of Section 24 and where the extension has the effect of reducing an EUA, this can easily be dealt with by a caveat from the Surveyor General notifying the Registrar of Deeds of the amended extent, who can then note a caveat against the EUA on the computer and simply endorse the holding title (when it is next lodged) to record the change in extent of the EUA without the necessity of going through the present tedious procedure alluded to above.

As a further refinement, a developer should be entitled to transfer EUAs held under the certificate of real right issued to him by imposing the right to one or more EUAs in the power of attorney to transfer a unit and by incorporating the EUA as a condition of title in the deed of transfer of the unit if it is to be registered simultaneously.

These proposals would not present problems with the delineation of EUAs by a developer after registration of the scheme in any way. The present procedure would continue as before, the developer having the right to apply for the issue of a certificate of real right in the normal way and then ceding those EUAs to the

persons entitled thereto, or alternatively by imposing a condition in the power of attorney and thereafter carrying the EUA forward as a condition of title.

The rights of bondholders would not be prejudicially affected in any way if these proposals were to be implemented. Bondholders' consents to the various acts of registration would still be lodged in the normal way. However Section 24(6) needs some consideration as the extension of a section is normally a *fait accompli* by the time the bondholder is approached for the consent to extension and it is difficult to understand the purpose of obtaining consents after the extension of the building has been completed.

Where EUAs are delineated by the body corporate under the authority of a unanimous resolution of its members, the body corporate should be required to take out a certificate of real right in the same way as required of a developer. This will provide a title for the EUAs and will therefore eliminate the present unsatisfactory procedure whereby the EUAs are ceded off the sectional plan without any title having been issued.

EUAs in terms of Section 27(A) and contained in the rules could be retained as they are, in any event, only changeable by unanimous resolution, and this option should be made available to the owners. It is, however, conceivable that, should these proposals be implemented, the need for Section 27(A) Exclusive Use Areas will fall away.

The author is confident that the change in procedure outlined above will result in a cheaper, quicker and better registration procedure, while retaining all the advantages and flexibility of the present system.

Cancellation of personal and praedial servitudes and the transfer duty implications attached thereto

By: A S West - Deeds Training, Pretoria

Due to the uncertainty and ambiguity of the Conference Resolution 19 of 2004 pertaining to the lodgement of transfer duty receipts for recording the cancellation of a personal or praedial servitude, the Chief Registrar of Deeds, in a letter, held the following view:

"As a result of RCR 19/2004 it has become practice in certain deeds registries to call for a transfer duty receipt/exemption certificate in respect of a personal or praedial servitude that has lapsed by virtue of the fact that the servitude served its time, for example the lapsing of a usufruct by the death or re?marriage of the person in whose favour it has been registered.

'Transaction', in terms of Section 1 of the Transfer Duty Act, 1949 (Act No. 40 of 1949) means "an agreement whereby one party thereto agrees to sell, grant, donate, cede, exchange, lease or otherwise dispose of property to another, or any act whereby any person renounces any interest in or restriction in his favour upon the use or disposal of property". Section 2(1) of Act No. 40 of 1949 states that transfer duty shall be levied "... on the amount by which the value of any property is enhanced by the renunciation, on or after the said date, of an interest in or restriction upon the use or disposal of that property...".

In view of the above?mentioned provisions of Act No. 40 of 1949, it is not necessary to call for the lodgement of a transfer duty receipt/exemption certificate where a servitude (interest/restriction) has lapsed after the event that such a servitude was registered for, for example the cancellation of a right of extension that has been registered in terms of Section 25 of Act No. 95 of 1986, in instances where all the buildings in the scheme have been erected.

Registrars of Deeds are, in view of the above, advised not to adhere to RCR 19/2005. The said registrars' resolution will be placed as an item on the agenda of the Registrars' Conference 2005 for further discussion."

Practice and procedure pertaining to the intestate succession of black persons

By: A S West - Deeds Training, Pretoria

1. INTRODUCTION

The Constitutional Court's decision of *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 handed down on 15 October 2004 declared Section 23 of the Black Administration Act 38 of 1927 and Regulation R 200 of the regulations published in Government Notice 10601 of 6 February 1987 unconstitutional. This impacted on the future administration of black estates and the practice pertaining to the conveyance of immovable property emanating from a deceased black estate.

It is not endeavoured to discuss, in detail, how the estates of black persons who died intestate have to be administered, but merely to provide a guide on what procedure must be followed, given the date of death of the deceased.

2. SUMMARY OF BHE-DECISION

Briefly the following was held:

- Section 23 of the Black Administration Act 38 of 1927 has been repealed with retrospective effect to 27 April 1994.
- Magistrates will no longer have the authority to administer black intestate estates.
- All estates, irrespective of race, colour or creed, will be administered by the Master of the High Court in terms of the Administration of Estates Act, 66 of 1965.
- The order of the court in respect of the administration of estates is not made retrospective, thus estates currently being administered by the magistrate in terms of Section 23 of the Black Administration Act, will continue to be administered by those magistrates. However, the customary rules of intestate succession should not be adhered to and the magistrate must apply the provisions of the Intestate Succession Act 81 of 1987.
- Although, the provisions of Section 23 have been repealed with retrospective effect, this will not apply to completed transfers of ownership, except where an heir had notice of a challenge to the legal

validity of the statutory provisions and the customary law rule of male primogeniture. How the challenge will be put into effect is for the courts to decide and only the future will tell.

- In polygamous marriages, each spouse will be entitled to R125 000 or a child's share (see Clause 3.4 infra).

3. THE CURRENT POSITION

3.1 Where the deceased died prior to 27 April 1994

The Master of the High Court has decided that, for practical reasons, these estates must be referred to the Master and must be administered according to the Black Administration Act 38 of 1927, and the regulations promulgated thereunder.

3.2 Where the deceased died after 27 April 1994

The Master of the High Court must administer all deceased estates where the deceased died after 27 April 1994. The estates will be administered in terms of the Administration of Estates Act 66 of 1965 and the Intestate Succession Act, 81 of 1987.

3.3 Where a deceased died after 27 April 1994 but before 15 October 2004

Where a black person died after 27 April 1994, but before 15 October 2004 and such estate was reported to the Magistrate, such a magistrate must finalize the estate, but the estate must be administered in terms of the Intestate Succession Act, read in conjunction with the Bhe?decision.

However, where the estate has already been wound up, in terms of the Black Administration Act and the regulations promulgated thereunder, the delivery of all assets will devolve in terms thereof, unless a dispute by an heir is made.

3.4 Where a deceased died after 15 October 2004

Such an estate must be administered in terms of the Administration of Estates Act 66 of 1965 and the Intestate Succession Act 81 of 1987.

3.5 Intestate Succession of Polygamous Customary Marriages

When the deceased was a husband in a polygamous customary union, the portion of the surviving wives must be determined as follows:

- When the deceased is survived by wives but not survived by any descendants, the estate is divided equally between the wives.
- When the deceased is survived by wives and descendants, each surviving wife is entitled to a child share or R 125 000, whichever is the greater. Where the estate is not large enough to pay each surviving wife at least R 125 000, the estate is distributed equally between the wives.
- A child share is calculated by adding the number of children surviving the husband (and predeceased children survived by descendants) to the number of surviving wives.

4. EFFECT OF THE BHE?DECISION ON THE DEEDS OFFICE PRACTICE AND PROCEDURE

4.1 Deceased died prior to 27 April 1994

Where a deceased died prior to 27 April 1994, his/her estate would have been wound up in terms of the Black Administration Act 38 of 1927 and the regulations promulgated thereunder.

Practitioners preparing deeds and documents for lodgement in a deeds registry must follow the following practice:

Drafting of the causa

The **causa** of the deed will reflect who is entitled to receive transfer of the land in question as referred to in the Regulation 4(2) certificate issued by the magistrate concerned, or if the provisions of Act 81 of 1987 were utilized, the conventional **causa**, as per the discussion **infra** must be applied.

Where the estate was administered in terms of Act 38 of 1927, the causa should read as follows:

"And the appearer declared that the said deceased died intestate on

And whereas the estate is being administered in terms of the regulations promulgated in terms of Act 38 of 1927, in terms of which the hereinmentioned transferee is entitled to the hereinmentioned property in terms of the approval of the magistrate issued in terms of regulation 4(2) of Act 38 of 1927.

Now therefore"

Where the property is an asset in a joint estate, the **causa** will obviously have to reflect that, if the surviving spouse is receiving the whole of the property, he/she is

entitled to a half share by virtue of his/her marriage in community of property to the deceased.

Deeds Office Requirements for Estates Administered in terms of Act 38 of 1927

- (i) The Regulation 4(2) certificate by the magistrate must be lodged, or endorsed on the power of attorney.
- (ii) No proof of intestacy or intestate heirs needs to be lodged.
- (iii) The balance for distribution need not be proved.
- (iv) Any open bonds must be lodged for disposal.
- (v) If the property forms an asset in a joint estate, and the surviving spouse is entitled to the land as a whole, the provisions of Section 45 of Act 47 of 1937 could possibly be made use of.
- (vi) The appointment of the representative need not be lodged, as the preparer accepts responsibility for such an appointment (see the definition of executor read with Regulation 44A(c) in Act 47 of 1937).
- (vii) Proof that the deceased was not registered for VAT must also be lodged. However, if it is a leasehold being transferred, no proof needs to be lodged.

4.2 Deceased died after 27 April 1994 but before 15 October 2004

Where the estate was wound up in terms of the Black Administration Act 38 of 1927, the procedure as referred to in paragraph 4.1 supra will be followed:

Where the estate was reported to the Magistrate, but the magistrate applied the provisions of the Intestate Succession Act 81 of 1987, read in conjunction with the Administration of Estates Act 66 of 1965, the procedure in clause 4.3 infra will have to be followed.

4.3 Where the deceased died after 15 October 2004

4.3.1 Supporting documents to be lodged:

- (i) A conveyancer's certificate in terms of Section 42(1) of the Administration of Estates Act of 1965 to the effect that the transfer is in accordance with the liquidation and distribution account, unless the estate is administered in terms of Section 18(3).

- (ii) A copy of any waiver or repudiation of an inheritance or legacy as proof of such waiver or repudiation.
- (iii) If the heirs entered into a redistribution agreement, a copy thereof must be lodged to determine whether the terms of such an agreement have been complied with. The complete facts must be mentioned in the recital of the deed.
- (iv) If it is alleged that one of the heirs is deceased, his death must be proved (death notice or death certificate). If the deceased left descendants who can inherit in terms of the will, such descendants must be proved by way of an affidavit of next-of-kin or death notice.
- (v) Proof that the deceased did in fact die intestate. This fact must be proved by lodging a death notice.
- (vi) Proof must also be lodged that the person or persons to whom the land is to be transferred are in fact the deceased's intestate heirs. An affidavit of next-of-kin or death notice is necessary to prove the intestate heirs of a deceased (see RCR 5.1.29/96).

The following must also be proved:

- (a) That the deceased and his alleged spouse were in fact married. A marriage certificate or affidavit from the surviving spouse must be lodged. In respect of customary marriages, the registration certificate is necessary.
- (b) The balance of the estate that is available for distribution. A certified copy of the liquidation and distribution account certified a true copy of the original will provide sufficient evidence in this regard.
- (c) Proof is also necessary as to whether or not the deceased has descendants that are entitled to inherit ab intestato from him. A certificate of next-of-kin will provide proof of this fact.
- (d) Transfer duty is not payable on land which is acquired by intestate succession, or as a result of a redistribution of assets in a deceased estate (Section 9(i)(e)(i) of Act 40 of 1949). However, proof must be lodged that the deceased was not registered for VAT (see discussion supra).

4.3.2 Where the Estate is administered in terms of Section 18(3) of the Administration of Estates Act 66 of 1965

The documents referred to in 4.3.1 must be lodged with the exception of:

- (i) The Regulation 42(1) certificate from the conveyancer.
- (ii) The liquidation and distribution agreement.

In such an instance, the preamble of the deed will refer to the representative and not the executor.

4.4 Drafting of causa

The circumstances pertaining to each inheritance will determine how the causa of the deed of transfer should be drafted. The following information, if applicable, should be mentioned:

- (i) The date of death of the testator

The date of death of the testator is important, as this represents the date on which the rights to the inheritance devolved on the heir.

- (ii) The way in which the land devolves

It should be mentioned that the land devolves intestate.

The particular section of the Intestate Succession Act involved should then also be mentioned.

- (iii) A short explanation why the inheritance devolves on the transferee

If the inheritance is transferred to any person(s) other than those on whom the right initially devolved, or in another proportion than that in which the right initially devolved on them, an explanation is required, e.g. redistribution agreements, renunciations of an inheritance, heirs who died before the testator, massing of estates, adiation, etc.

- (iv) Transfer from a massed estate

Should any of the exceptions to Section 21 of the Deeds Registries Act apply, the causa should indicate that the transfer is on behalf of the joint estate (see the provisions of Regulation 50(2)(c)).

The Registerability and effect of a condition excluding community of property

By: AS West - Deeds Training, Pretoria

From a conveyancing perspective, a testamentary condition, excluding community of property in respect of immovable property and inserted into a deed when such immovable property is bequeathed or donated, is a common occurrence, but is such a condition lawful and binding, and what effect does such a condition have on creditors?

To determine whether a condition is a perfectly legal and competent one to insert in a deed of transfer, it is necessary firstly to look at the position under the common law and thereafter to ascertain whether the common law position has in any way been altered by statute.

COMMON LAW POSITION

From a common law point of view Voet (23 2 77 Stone's translation) says:

"But if you declare that you make a gift or bequest to only one of the spouses, so that it shall not go into statutory community then in this case the law of donation is to be followed. For since the spouses themselves could have exempted their own property from community by means of a marriage agreement why should not the third party whose donation is quite voluntary be able to make it subject to this condition which is not essentially wrong nor opposed to legal principles. And since a donor would have prevented his gift from going into a community of burdening it with a fideicommissum, surely there is no reason why he should not do the same by means of an unequivocal prohibition contained in the deed of gift itself."

It is thus clear from the extract from Voet that a testator may avoid his bequest from forming an asset in a joint estate in two ways; he may either burden the land with a fideicommissum or expressly exclude the inheritance from community of property.

The first method of burdening the land with a fideicommissum will not be discussed in this article.

With regard to the second method, Steyn *The Law of Wills in South Africa* p.76 states as follows:

"A testator may validly institute as heir or make a bequest to a woman who is married in community of property on such terms that the inherited or bequeathed

property is free from the husband's control" (**Bosman v Richter** 1853?6 C (2 Searle) 78.

In the case of **Ex parte Bear and Sack** 1926 W 240, it was further held that, from a registration point of view, there can be no objection to including such a condition in a deed of transfer because this has been done for many years.

In **Cuming v Cuming** 1945 A at p.201 Davis A J A also held that a testator or donor can attach to his bequest or gift any modus or condition which is not prohibited, and it will be enforced. The condition under discussion in this article is obviously not prohibited, as it is not disgraceful, illegal, immoral or **contra bonos mores**.

From the above case law and a further passage where Voet (23 4 45 Krause's translation) also says: "For if a stranger making a gift or bequeathing the legacy has specifically directed that he does not desire what has been donated to become common property, his wishes must prevail for it is in the power of the donor making a gift to choose the condition which he desires to be attached to his gift," it is perfectly clear that immovable property can be bequeathed subject to such condition, and the said condition may be incorporated in the title deed of the immovable property concerned.

STATUTORY POSITION

The question now to be considered is whether there is anything in the Deeds Registries Act 47 of 1937 (the Act) which may alter the common law with regard to the registerability of the condition being considered.

Section 17(1) of the Act provides that immovable property, which would upon transfer form part of a joint estate (my underlining), must be registered in the name of the husband and the wife. From the wording of this section it is clear that the common law position discussed above is not altered. On the contrary, it allows for immovable property to be registered in the name of any one spouse married in community of property, provided that the immovable property does not form part of a joint estate. Section 17(1)(c) of the Act, however, provides that the full names of the other spouse must be referred to.

Section 63(1) of the Act provides, *inter alia*, that no condition purporting to create any personal right; and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of being registered. The aforesaid section only applies to conditions imposing a restriction on the

rights of ownership, whereas the purpose of the condition in question is not to restrict, but to preserve the legatee's full rights in the event of a marriage in community of property.

Nothing else can be found which may be regarded as altering the common law position. The condition can thus be imposed on donation, or in terms of a testamentary bequest, and may be taken up in a deed of transfer.

The common law does, however, not allow for a similar condition to be imposed on the sale of immovable property, as the imposition and registerability is restricted to a bequest or donation. Where immovable property is purchased with money or the proceeds of the sale of immovable property that has been excluded from the community of property, such newly acquired immovable property may be registered solely in the name of the spouse thus acquiring the property, provided the Registrar of Deeds can be provided with documentary evidence that the land was purchased from funds which are excluded from the joint estate.

CANCELLATION OF CONDITION

Registrars of deeds are often confronted by conveyancers who require that the condition in question be removed from the title deed, the reason being that if immovable property is not registered in the name of a spouse, such a spouse cannot obtain a State housing subsidy.

Conveyancers are of the opinion that such a condition is a *nudum praeceptum* and does not carry a sanction of forfeiture. This argument or point of view does not hold any substance, as our courts hold that the condition is for the benefit of the owner.

The condition can only be removed from the title deed by the beneficiary, who must apply to court for the deletion of the condition imposed for his benefit, alleging that there is no one beside himself interested in carrying out the directions of the will (see, for example **Ex parte Strumfer NO** 1945 2 PAG 34 and **De Kock v Admin of de Kock's Estate** 1945 (2) PH G 49).

As a costly alternative, the registered owner can sell or donate the land to the joint estate, in which case transfer will be effected by virtue of a formal deed of transfer and transfer duty will have to be paid on one half share of the purchase price or fair value of the land.

EFFECT OF CONDITION ON SEPARATE ESTATES OF SPOUSES MARRIED IN COMMUNITY OF PROPERTY

It was the common belief of testators and donors that immovable property bequeathed or donated subject to a condition that the property will not form an asset in a joint estate, will be excluded from the community of property and is protected, should the spouse of the donee or heir subsequently be sequestrated. This belief was confirmed by case law (*Bosman v Richter* 1853?6 C (2 Searle) 78, and *Ex parte Bear and Sack* (supra).

The judgement in *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA) has overruled this belief. The condition in question is relevant only for the purposes of the relationship between the spouses themselves (*inter partes*). The court held that each spouse's estate comprises not only his undivided interest in the joint estate, but also his separate property falling outside of the joint estate. It is thus clear from the above decision that assets owned separately from the joint estate also form part of the joint insolvent estate.

CONCLUSION

From the above it is evident that the condition in question is registerable, but the relevance thereof is limited to the parties *inter partes* only. The common belief that such assets are protected against future creditors of the joint estate no longer prevails.

Extending clauses in Deeds of Transfer

By: Marie Grové - Deeds Training, Pretoria

Extending clauses in conventional deeds are prescribed by the regulations to the Deeds Registries Act, 1937 (Act 47 of 1937), i.e. forms "TT" and "UU".

Form "TT" is the form utilized for the extending clause of a deed of transfer in respect of an entity of land not previously registered. Form "UU" is utilized for an entity of land already held under a title. Where a piece of land, or a portion thereof, is to be registered for the first time, the extending clause will follow form "TT", and the extending clause in a subsequent transfer of that same piece of land will follow form "UU".

The prescribed form for a deed of transfer is form "E" to the regulations. According to form "E", the property description must be followed by the extent, the extending clause and then the conditions of title. When the extending clause in the title deed is in form "TT", the title deed is then that of the first (extending) deed. The extending clause of the subsequent deed of transfer will then read as follows:

"First transferred and still held by deed of transfer"

When the extending clause of the title deed is in form "UU", this form will be followed in subsequent deeds of transfer, where the first title of the land is mentioned first, then reference to the diagram or general plan, and the number of the title deed will then be reflected as the current deed of transfer.

Previously, e.g. in the 1960s, the property descriptions and extending clauses did not follow the above format, especially when land was registered for the first time. It caused great confusion to establish whether the title deed is that of a first transfer or not and which information is important in compiling the extending clause in the subsequent deeds of transfer.

Below are two examples of such extending clauses. Take note that, according to form "E", the property description must be followed by the extent, then the extending clause and then the conditions of the title. In the following two examples, the property description is followed by an extending clause and then the extent, which is then directly followed by the conditions.

EXAMPLE 1

Erf 000 situated in Third Avenue Township, Registration Division J R, Province of CCC

HELD BY ... under Certificate of Consolidated Title No. ???/???, dated ... and transferred to under Deed of Transfer No. ???/??? dated

MEASURING Ten Thousand (10,000) square feet.

As will more clearly appear from the General Plan S.G. No ???/??? approved by the surveyor general on

SUBJECT TO THE FOLLOWING CONDITIONS: ...

EXAMPLE 2

Erf 000 situated in the township AAA, Registration Division JR, Province of CCC

HELD IN FAVOUR OF by virtue of Deeds of Transfer ???/???

EXTENDING 3344 (Three Three Four Four) square metres

As will more fully appear from general plan number S.G. ??/?? approved on

SUBJECT TO THE FOLLOWING CONDITIONS: ...

Both the abovementioned examples appeared in title deeds of entities registered for the first time, i.e. a first deed of transfer. They are not in accordance with form "E" and, according to the extending clause in "Example 1", it appears to be a deed of transfer of an entity that was transferred previously.

Is there any manner in which this confusion can be clarified?

Here is a useful tip on how to identify an extending clause in any deed of transfer being the first or subsequent deed of transfer.

Take note of what details are set out **after the extent of the property**. If it is a reference to a general plan or a diagram, as in both the above examples, the title deed will be that of the first registration of an entity. Also see the format of form TT, which is that of a first registration: "... (disclose the full description of the property) measuring as will appear from the annexed diagram/general plan ...". You will note that reference is made to the diagram or general plan right after the extent is disclosed.

Secondly, if reference to a title deed is stated directly after the extent, that title will be a title of an entity that was previously registered, i.e. a subsequent transfer. See form "UU" in this regard: "... in extent ... (state the size of the property) ... first transferred/registered by ...(state the serial number...)..." In this case the first deed transferred is mentioned after the extent of the property.

Knowing that many, examiners and conveyancers alike, struggle to master extending clauses, the above explanation will hopefully assist in preparing or examining deeds of transfer.

Subdivision of the Common Property in a Sectional Titel Scheme - Part III -

By: A Lombaard, Deeds Training, Pretoria

With this four-part article, the reader is guided through the intricacies of the procedure to be followed when the common property of a sectional title scheme is to be subdivided.

In Part 1 of this article the reader was introduced to the concept of subdivision of the common property in a sectional title scheme; the basic preparatory steps to be taken for such subdivision; and the deeds and documents to be lodged at the deeds registry for registration thereof.

Part 2 of the article focused on discussion about the procedure to be followed where the whole or part of a section(s) is registered over the portion of the common property to be transferred.

The focal point of Part 3 is the procedure to be followed where the whole or part of an exclusive use area(s) is registered over the portion of the common property to be transferred.

Where the whole of an exclusive use area is affected by the alienation of a portion of the common property in terms of Section 17 of the Sectional Titles Act, such exclusive use area must be cancelled in toto with the written consent of the holder thereof (Section 17(4B)(a)). Usually this cancellation will be done simultaneously with the registration of the transfer of the portion of the common property. If the exclusive use area is encumbered by a registered mortgage bond, the written consent to the disposal of the bond in respect of the exclusive use area must be obtained. The bond may either be cancelled or the exclusive use area may be released from the operation of the bond.

For the cancellation of the whole of the exclusive use area, the following documentation must be lodged:

- the written consent of the holder of the exclusive use area to the cancellation thereof;
- the sectional title deed of the exclusive use area;
- all the sectional mortgage bonds (if any) registered over such exclusive use area together with the consent of the bondholder(s) to the disposal of such sectional mortgage bonds in respect of the affected exclusive use area;

- the title deeds of any other registered real rights over the exclusive use area, if any, for cancellation; and
- a transfer duty receipt for the acquisition of the common property.

Where part of an exclusive use area is affected by the alienation of a portion of the common property in terms of Section 17 of the Act, such part of the exclusive use area must be cancelled with the written consent of the holder thereof (Section 17(4B)(a)). In this instance the following documentation must be lodged:

- The written consent of the holder of the exclusive use area to the partial cancellation thereof;
- the sectional title deed of the exclusive use area;
- all the sectional mortgage bonds (if any) registered over such exclusive use area together with the consent of the bondholder(s) to the disposal of such sectional mortgage bonds in respect of at least the affected part of the exclusive use area (ie the release of that part of the exclusive use area from the operation of the bond, or the cancellation of the bond);
- the title deeds of any other registered real rights over the affected part of the exclusive use area, if any, for cancellation; and
- a transfer duty receipt for the acquisition of the common property.

Usually such cancellation of the exclusive use area or part thereof will be done simultaneously with the registration of the transfer of the portion of the common property. For the transfer of the portion of the common property, the following documentation must be lodged:

- a deed of transfer in the prescribed FORM H in Annexure I to the regulations (Section 17(3));
- a copy of the unanimous resolution, referred to in Section 17, certified by two trustees of the body corporate (Section 17(1); Section 17(2) and CRC 18 of 1997);
- a diagram approved by the Surveyor-General - if the portion of the common property to be alienated has not been demarcated and depicted on an existing diagram approved by the Surveyor-General (Section 17(3)(a) and CRC 18 of 1997);
- all the mortgage bonds over the units and the scheme and related written consents of bondholders as at date of sale in terms of Section 56 and

Section 57 of the Deeds Registries Act for disposal in respect of the portion concerned (Section 18; RCR 35 of 2002; RCR 45 of 2003 and RCR 35 of 2004); and

all usual prescribed documentation, eg. a special power of attorney to pass transfer; a transfer duty receipt, rates clearance certificate for the land, usual documentation pertaining to the subdivision of land, etc.

The correctness of RCR 35 of 2004 is debatable. However, since an elaborated treatise on the acceptably correct interpretation of Section 18 of the Sectional Titles Act falls outside the ambit of this article, the writer concludes with the desire that the discussion preceding the resolution tabled as RCR 35 of 2004 were recorded.

The final part of the article will be dedicated to the procedure to be followed, where the Section 25 right to extension of the sectional scheme, or part thereof, is affected by the alienation of the common property.

Conveyancing through the cases

By: AS West, Deeds Training, Pretoria

This column provides a brief exposition of the case law relevant to conveyancing and notarial practice. However, the case law must be read *in toto* and the summaries should not be relied upon.

LEASE

Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA)

In this case the court was asked to pronounce on the validity of a lease where the parties had not expressly agreed on the amount of rent payable under the lease. The simplified facts were as follows: The contract provided that the appellant (S) (via its predecessor) would have the option to lease certain properties from the respondent (T) on the terms and conditions to be negotiated between them in good faith. It further contained an arbitration clause which provided that, in the event of a dispute arising between the parties in respect of any of the terms and conditions of the lease agreement, the dispute would be referred to arbitration and the decision of the arbitrator would be final and binding on the parties. At some stage T refused to engage in negotiations. S then instituted proceedings

in the High Court to compel T to engage in negotiations. In the court a quo it was held that there was no agreement between the parties as to the essential terms of the lease and that it was therefore an unenforceable agreement (see *Southernport Developments (Pty Ltd) (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v Transnet Ltd* 2003 (5) SA 665 (W)).

On appeal *Ponnan AJA (Harms, Farlam, Cameron JJA and Comrie AJA concurring)* held that it was trite law that the parties to a lease agreement could validly agree that the rent be determined by a particular arbitrator. Furthermore, the court reasoned, that principle should also be extended to terms other than rent in a lease agreement. It should be extended to any other terms, the determination of which might have delegated to a third party. In the present case the parties' failure to agree on any term or condition of the lease agreement constituted a dispute and would therefore be referred for arbitration. The inclusion of the arbitration clause in the agreement distinguished it from an agreement to agree, which would have been unenforceable. In the present case the final and binding nature of the arbitrator's decision rendered certain and enforceable what would otherwise have been an unenforceable (preliminary) agreement.

The appeal was accordingly allowed with costs.

SUSPENSIVE CONDITION

De Villiers and Others v Van Zyl and Another [2005] 1 All SA 443 (NC)

This case concerned an appeal against the dismissal of De Villiers's (DV) application for an order obliging Van Zyl (VZ) to sign documents necessary for the registration of a caveat against the title deed of immovable property belonging to VZ. DV had sued VZ for payment of an amount owing in terms of a loan agreement. The matter was settled between the parties, and one of the terms of the settlement was that a caveat would be registered against the title deed of VZ's immovable property. The court a quo (the decision of which was reported under the citation of *De Villiers en Andere v Van Zyl en 'n Ander* [2002] 4 All SA 262 (NC)) held that the settlement agreement was subject to a suspensive condition which was never fulfilled, with the result that no agreement came into existence. On appeal Majiedt

J (Kgomo JP and Musi AJ apparently concurring) held that the settlement agreement was not subject to a suspensive condition and that no cancellation of the contract had concurred. It based its finding on the fact that the settlement agreement between the parties left no room for an interpretation that allowed for a suspensive condition to be read into the agreement. As a result, the parole evidence rule prevented it from allowing extrinsic evidence because there was no ambiguity in the agreement (in Paragraphs 8 to 11 of the reported judgment).

The appeal was accordingly allowed with costs.

NOTARIAL BOND

Ikea Trading and Design AG v Boe Bank Ltd 2005 (2) SA 7 (SCA)

In this case the requirements for a 'mortgagee' to acquire security in movable property registered in terms of Section 1(1) of the Security by Means of Movable Property Act 57 of 1993 (the Act) was looked at.

The facts were as follows. BOE Bank (the bank) was the holder of a general covering notarial bond passed in its favour by Woodlam Industries CC (Woodlam) over the assets of the latter. The appellant in the present proceedings, Ikea Trading, also had a bond registered over the assets of Woodlam in its (ie, Ikea Trading's) favour. When Woodlam was placed in final liquidation, the bank applied to the High Court for an order declaring that the liquidation and distribution account in respect of Woodlam had to be redrawn so as to reflect its preference by virtue of the bond. The bank based its application on the fact that the bond in favour of Ikea Trading did not comply with the requirements of Section 1(1) of the Act because it failed to specify and describe the assets referred to in the bond in a manner that rendered the assets readily recognizable. As a result, so the bank argued, the bond in favour of Ikea Trading did not confer on it (Ikea Trading) real security. Ikea Trading, in turn, argued that the property listed in the bond could be identified with the aid of extrinsic evidence. Thus, it argued, it had a deemed pledge in them, and accordingly ranked as a secured creditor in the estate of Woodlam. The bank, in turn, contended that the assets had to be identifiable from the bond itself, and that extrinsic evidence could not be led to

establish that they were. The bank further argued that if the bond did not constitute notice to third parties itself - but had to be read with references to other documents or identification outside of the bond - then the object of the legislation would have been defeated.

Lewis JA (Zulman, Farlam, Nugent JJA and Ponnar AJA concurring) held that it was clear that without reference to invoices and other documents in respect of the items listed or without the intervention of some person who was able to say that the particular items listed were subject to the bond, the items could not be identified as those listed in the bond.

Furthermore, the bond had to specify and describe the property so as to render it readily recognizable. The third party had to be able to identify the items by reference to the document alone by correlating the descriptions contained in it with property fitting such descriptions. It held that in the present case the items enumerated in the bond had not been specified and described in the manner required by Section 1(1) of the Act.

PARTNERSHIP

Geldenhuis v East and West Investments (Pty) Ltd 2005 (2) SA 74 (SCA)

The potential legal pitfalls of a partnership once again came to the fore in this case. A partnership consisting of Geldenhuis (G) and Britz (B) hired certain premises from East and West Investments (E&W). The partnership was later dissolved. E&W instituted action against G and B for the balance of the rental due under the lease. At the commencement of the trial, E&W informed the magistrate that its dispute with B had been settled, and handed in a deed of settlement, recording that agreement, which was made an order of court. The deed of settlement provided that B had tendered to pay, and E&W had accepted, an amount of R45 000 'in full and final settlement of any claims that [E&W] may have against [B]'. In terms of the deed, the parties further agreed that 'this settlement does not entail the substitution of any existing obligations', and that it merely served to discharge B's obligations as a former member of the partnership. The magistrate found in favour of E&W and awarded it damages to the amount of R36 791,10. But the magistrate's order did not

specify that it was granted against G and B jointly and severally. On appeal, first to the Transvaal High Court, and later also to the Supreme Court of Appeal, G sought to argue, on the strength of the deed of settlement, that he was in law released in respect of the first R45 000 of the partnership debt, and that, since the amount found to be owing was less than R45 000, the action should be dismissed.

Comrie AJA (Harms, Navsa, Nugent and Conradie JJA concurring) held that, contrary to the submission made on behalf of G, there was no part payment prior to the institution of action which had the effect of reducing the quantum of the solidary debt of the partners. E&W was entitled to sue both G and B, jointly and severally, for the full amount of the disputed debt and it was accordingly entitled to have judgment entered against both partners, jointly and severally - the one paying, the other to be absolved - for the amount admitted or agreed (in the case of B) or the amount proven (in the case of G).

The fact that the magistrate's order did not specify joint and several liability between the partners was neither here nor there. The particulars of claim expressly prayed for an order in that form, and given the nature of the liability for partnership debts, joint and several liability was implicit in the order granted against G. The amount of capital eventually payable by G would depend on how much his partner, B, had actually paid. Thereafter it would be for the former partners to exercise their respective rights of recourse inter se.

The appeal was accordingly dismissed with costs.

TRUSTS

Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA); Land and Agricultural Development Bank of South Africa v Parker and Others [2004] 4 All SA 261 (SCA)

The appellant (the Bank) claimed that the respondent (the Trust) owed it more than R16 million. The Trust was established in 1992. The trustees were Mr and Mrs Parker and one Senekal, the Parkers' attorney. Senekal resigned as trustee in 1996. The trust deed required that 'there shall at all times be a minimum of three trustees in office'. But the Parkers failed for nearly two years to appoint a third trustee. Between April and October

1998, the Parkers accepted loans from the Bank for the repayment of which they purported to bind the Trustee as co-principal and surety. The loans were taken out by companies associated with the Parker's family business. (By October 1998 the Parkers - prompted by a direction from the Master - had at last appointed a third trustee, their son.) The Bank accepted the son's affidavit that he was not consulted or informed about the loan agreements concluded during his term as trustee. (For the purpose of the remainder of this discussion, the son's involvement in the dealings surrounding the Trust will be ignored.) The loans were not repaid and the Bank moved to sequester the Parkers and the Trust. A single judge confirmed the sequestration order of Mr Parker and the Trust but the decision was overturned on appeal to a full bench, which set aside the sequestration order. The Bank then appealed to the Supreme Court of Appeal.

The Trust's main defence was that the two trustees (Mr and Mrs Parker) did not have the power to bind the trust in the absence of the peremptory minimum of three trustees. Carmeron JA (Mpati DP, Brand JA, Erasmus and Jafta AJJA concurring) held that the Trust could not be bound while there were fewer than three trustees. The trust estate could therefore not be bound outside the provisions of the trust deed. The trust deed specifically required a minimum number of three trustees. When fewer trustees than the number specified in the trust deed (namely, three) were in office, the Trust suffered from an incapacity that precluded action on its behalf.

The court held that because the Bank based its case squarely on the three-trustee requirement, its claim on that ground had to fail. But the court was quick to point out that the Parkers were unable to rely on their default (namely to appoint a third trustee) to escape the Bank's claim. By happy symmetry, the Parkers too, had based their case solely on the three-trustee requirement. When the trustees had appealed against the granting of the sequestration order, the trustee who had signed the relevant court papers had been declared insolvent. The trust deed provided that upon insolvency, trusteeship would be automatically terminated. Thus, at the time when the appeal against the granting of the sequestration order was lodged, there was a sub-minimum of trustees acting for the trust. The court accordingly held that the application

for leave to appeal, and subsequent steps taken by the trustees were therefore invalid. Thus the Trust did not validly petition the court for leave of appeal, nor was it at any stage properly before the full court. The full court should therefore have struck the appeal from the roll. On that basis, the present appeal by the Bank succeeded. The court ordered that the Parkers, who brought the appeal proceedings without authority, were to pay the costs, which included the costs of two counsels, from their own pockets, jointly and severally.

ATTACHMENT

September and Another v Nedcor Bank Ltd and Another [2005] 1 All SA 96 C

The first respondent had obtained default judgment against the appellants. The appellants' immovable property (which the first respondent had had as security) was attached, but this attachment lapsed. The first respondent sought to have the property re-attached, but the appellants argued that, as a preferent claim for rates existed against the property, it could not, in terms of the clear provisions of the Magistrates' Courts Act 32 of 1944 ("the Act"), be re-attached.

On the face of it, Section 66(4) and (5) of the Act is clear and unambiguous. However, it was clear from the research into the history of this section that errors had been made in the drafting thereof - contrary to the recorded intention of Parliament, the effect of the amendments was that only attachments of immovable properties which are subject to other preferent claims lapse after 12 months, and the intervention of a court was only necessary when it was sought to extend the 12-month period of an attachment.

Under the circumstances and in view of the obvious mistakes by the draftsmen, the amendments should be restrictively interpreted so as to change the existing law as little as possible and should not be interpreted in a manner which would preclude a creditor to re-attach property that is the subject of some other preferent claim.

Appeal dismissed with costs.

Creation of land records prior to formal registration in Lesotho

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SUMMARY

The promulgation of Land Act 1979 in Lesotho introduced the current land legislation, setting the basis for title registration system. Sporadic registration, where individuals apply for registration when they have some land transactions to undertake, does not give a complete picture of land holdings and thus imparts deficiencies to development planning, especially in peri-urban areas. This article reviews various initiatives to redress this information vacuum and the current proposals under the ongoing land reform process, suggesting that land records at various levels should be maintained even prior to formal land registration.

INTRODUCTION

Land Registration under the Land Act 1979 can be considered as a title registration system where the focus is on the land, thus requiring unique land parcel identifiers. The unique identifier is based on the national grid reference for the 1:2500 cadastral maps; and these plot numbers are also used as the actual lease number. The plot co-ordinates identify the sheet number for the cadastral map on which the plot falls, therefore surveying of plots is a prerequisite for registration. When the Land Act 1979 came into operation, it was evident that due to a lack of qualified land surveyors, it would be impractical to have all land holdings property surveyed and registered. It was therefore decided that only people who had to undertake some transactions in land could convert their title to leases. Leases were issued for new allocations within the urban areas.

The new allocations on the other hand could not wholly meet the requirements for new residents, which led to the development of a clandestine land market, where field owners within the urban peripheries subdivided their land and sold the land for residential purposes. These 'illegal' land sales were facilitated by some chiefs, who issued backdated defunct allocation certificates known as "Form Cs". The illegality of such land sales was re-affirmed by Justice Maqutu in his judgment of 18 October 2003, stating "Respondents have gone so far as to say they offered to buy alternative land for applicants at Khubelu. The specific applicants are not identified. What puzzles the court is that in Lesotho land cannot be lawfully sold

- but residents claim that they associated themselves with sale of land."

The informal land market, however illegal, has resulted in a sprawl of unplanned settlements in all the peri-urban areas. Related problems emanating from this situation are summarized in the draft National Land Policy (July 2002), which stipulates "Official attempts to regulate land use and building development have met with very little success. Much of the construction that is taking place in peri-urban areas is unauthorized. Rapid and uncontrolled growth and the absence of planning have created serious problems for the provision of bulk infrastructure. Valuation rolls are out of date and property rates remain uncollected. Ground rents for leases are no longer being levied. The urban population is growing at around ten percent per annum.

The vast majority move into the unserved informal sector in the peri-urban fringe, where property tenure is insecure. The magnitude of the problem is quantified by the Maseru City Council (2002), which states that "currently, as per 1999 census, the population of Maseru is about 393,154 people; and over 70% of the population live in the unplanned settlements which lack health centers, roads, clean water, high schools and many other communal facilities which go with urban development".

The informal land sales involve subdividing agricultural land and converting it into settlements and this behaviour is no longer restricted to peri-urban areas, but it is spreading to villages within the rural areas. The problems are therefore no longer those of urban planning and service delivery, but food security is threatened as a consequence of diminishing agricultural land. The ongoing decentralization and establishment of local authorities cannot be sustained without the financial resources that can be achieved through the collection of land taxes, which can only be done when there are proper land records. The paper analyses various attempts to establish land records in Lesotho, linking the proposals with the reforms proposed in the Land Bill 2004 due to be tabled in Parliament.

LAND RECORDS ESTABLISHMENT

UNFIG (1999) defines "land registration" as the

process of recording rights in land either in the form of registration of deeds or the registration of title to land and "adjudication" as the process by which the ownership and rights in land are officially determined. Lesotho's registration system focuses on the land with the unique identifier defined from cadastral surveying. Title registration systems is "...an authoritative record, kept in a public office, of the rights to clearly defined units of land as vested for the time being in some particular person or body, and of the limitations, if any, to which these rights are subject. With certain unavoidable exceptions known in the English system as 'overriding interests', all the material particulars affecting the title to the land are fully revealed merely by a perusal of the register which is maintained and warranted by the State." (Simpson 1976). To ensure that the land records under the title registration systems are authoritative and warranted by State requires the lengthy processes of adjudication and surveying to cadastral standards, which are usually rigorous.

The processes of land registration in Lesotho can be quite time-consuming, with an example of an application made in December 1997 and lease being collected in June 2002 (Steyn 2003) not being uncommon. It is therefore not surprising to find that there have been a number of initiatives to bypass the formal land registration system and create land records that can be used for development projects. This is done in the recognition that "there is evidence that efficient use of development project funds may be greatly impaired by poor land information, especially in urban areas" (Ting and Williamson, 1999).

Urban Sector Reorientation Project

Land records creation projects include Urban Sector Reorientation Project 1988, which was an urban development project supported by World Bank. The land component of this project was basically upgrading unplanned informal settlements in the peri-urban areas, specifically Maseru South, with a view to achieving the high densities, providing basic infrastructure and thus developing a basis for land taxation, that is, income for the Maseru City Council. This aspect was area-based with the intention to replicate it in other suburbs as well as other towns. The Land records aspect recognized that it would be difficult to issue Land Act leases to all the occupants of sites in these areas, since their evidence of title varied from backdated form Cs to letters of affidavits written by chiefs. The surveying of the sites was done by identification of the plot boundaries on orthophoto maps, delineating such boundaries on a plastic transparency, and issuing unique plot numbers for the sites. The owners of surveyed plots would thereafter be issued with re-validated form Cs, giving them

better security than their existing informal titles. The process also included an element of re-planning and providing road and services access and land taxation as an ultimate benefit for the Maseru City Council. The project did not achieve its objectives, and the accesses, which had been demarcated, were abandoned, leaving the status quo of informal and unplanned settlements. Major causes for the failure of the project include the fact that the proposals in the project had no legal provisions under the Land Act 1979, meaning that the legality of the processes was questionable. This issue has been redressed in the Land Bill 2004.

Government policy on informal settlements

The legality or illegality of intermediate titles in the process of upgrading informal settlements can be attributed to individual governments' will and policy to redress the informal settlements. Durand-Lasserve suggests that policies range from authoritarian to laissez-faire and can be viewed as falling into four major groups: The first 'authoritarian' policy would view illegally occupied land as being available to the government; thus the illegal use of land is sufficient grounds for the eviction of 'irregular' occupants; The second policy would attempt to regularize illegal occupation, risking the encouragement of more illegal practices and possibly constituting the public powers' abdication from promoting urban law and order. The third policy would regard illegal settlements as places of marginality and social disorder, where the intervention of the public authorities could stir up severe social unrest and should therefore be avoided. The last policy would see irregular settlements as an inevitable but transitory problem that economic development and social mobility will eventually overcome, with a combination of laissez-faire and corrective measures being deployed (Durand-Lasserve: 1996).

The Lesotho government's policy towards the informal settlements has not been clearly defined in policy documents. The principal guidance is in Clause 17 of the National Constitution (1993), which provides for "Freedom from arbitrary seizure of property (1) No property, movable or immovable, shall be taken possession of compulsorily, and no interest in or right over any such property shall be compulsorily acquired, except where the following conditions are satisfied, that is to say ? ... (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

In 1985 the government intervened in a project known as Mabote Project to formalize and replan informal

settlements that were being developed on the northeastern periphery of Maseru. This involved collecting the form Cs from the informal settlers, re-planning the areas and re-allocating the settlers new properly planned land parcels. This intervention was successful, partly because the settlers had not yet done substantive developments when the project started and the legality of the processes was ignored.

In 1999, following a completion of a Maseru bypass road, the government declared a corridor of about 300 metres on both sides on this road as a Selected Development Area (SDA) with the aim of ensuring that developments in that area were properly planned. However, as usual, the field owners continued to subdivide and illegally sell their land within this area. Government's intervention, this time, was to take the perpetrators to court for unlawful occupation of the land and, where the government won the case, the properties in question were demolished. These approaches by the government reflect the variation of approaches from the laissez-faire to corrective measures, if not an authoritarian approach.

The judgment on Loanika Moletsane and 42 others versus the Attorney-General and Minister of Local Government characterizes the role that the courts of justice can play to moderate the undesirable elements of government policies towards informal settlements. In this case L. Moletsane and 42 others, who were in the Maseru bypass road SDA, requested the court to interdict the government from removing or demolishing their houses without compensation. In his judgment for the applicants, the judge intimated the need for proper land records saying, "Letters of allocation or form Cs and form C2s issued by chiefs cannot correspond with land registers - simply because some land registers did not always exist. Even those land registers that existed such as those of Upper Thamae Maseru have been found to have been fraudulently re-written. The case M Matabola V S Tsotako, which ended in the Court of Appeal as S Tsotako V M Matabola C of A (CIV) No 10 of 1986, illustrates the point. In this case a form C (letter of allocation) had allegedly been issued several years before it was actually printed. Had it not been for the Government Printer dating and numbering of years in which form Cs were issued, this fraud would not have been discovered." (Maqutu, 2004). This highlights the need to develop innovative approaches of creating land records that cannot be fraudulently copied to perpetuate informal settlements. Proper land records will instill confidence in users, which will impart tenure security, and government for its part will not be seen as abdicating its responsibility of maintaining law and order.

CURRENT PROPOSALS FOR LAND RECORDS

There are a number of initiatives that are being envisaged to redress the lack of proper land records. The need for legal backup for the transitional stage of informal settlements into the formal leases is also recognized in the Land Bill 2004.

Prevention of illegal encroachment of settlements on agricultural land

The meeting of Cabinet on Tuesday 24 September 2002 issued a directive that a formal order be issued, preventing people from building on arable land with the Principal Secretary for the Ministry of Local Government being responsible for follow-up. This was in recognition of the rampant encroachment of settlements into arable land within the country's villages and urban peripheries, leading to the current decline in agricultural produce and the state of famine. As previously indicated, the existing land legislation prohibits this unfortunate practice that obviates sustainable land use, yet the perpetrators of these unfortunate acts are in some cases facilitated by the very protectors of the law. The government thus directed that relevant mechanisms to stop encroachment settlements into agricultural land be implemented.

The implementation strategy includes concerted sensitization of affected communities to enlighten them about the provisions of the land law, and planning initiatives where settlements are delimited from the agricultural land. Within the settlement boundaries, relevant experts summon their skills in village-planning techniques to create more sites for settlement and village amenities. Outside the settlements, land-use plans are developed in consultation with the affected communities. These initiatives will be further strengthened by the implementation of Local Government Act 1997, which is scheduled to be implemented by holding community council elections before April 2005. The Land Bill 2004 also provides the necessary legal framework for the initiative.

Digital Agricultural Mapping

The Ministry of Agriculture and Food Security sought technical support from the Chief Surveyor's office to undertake mapping to facilitate block farming as part of food security initiatives. The block farming concept is the pooling of small individual land units into a block where one crop type can be grown, thus enabling economic utilization of implements and inputs. The maps ensure that the acreage for individual land can be calculated for the purpose of sharing the output and re-establishment of the land boundaries, once

the project has been terminated. In addition, the commercial entities willing to support such ventures require maps indicating the areas of investment.

The proposal for the Inventory of Fields utilizes simplified approaches of the Land Inventory, a concept developed for recording land parcels prior to formal registration under the land reform project (Concept Note 2004). The creation of an inventory of fields would involve the procurement of images required for the areas of interest, training operators on identification of field boundaries and digitizing them, as well as field completion of ground truthing and associating the fields with the actual users. Ideally the relevant databases should be established in the district offices for maintenance and inclusion of other data of interest, such as annual productivity from each of the fields.

In July 2004, advertisements of tenders for the production of digital orthophoto mapping covering the whole country were published. Key mapping specifications included: 1:20,000 colour photography; mapping scale 10000; spatial accuracy of less than 1 metre; orthophoto delivered in geo-referenced tiff files clipped to 1:5000 national map index. At this stage quotations from five suppliers have been received and are being analysed. These land records and land transactions such as sharecropping and sub-leasing will require legal backing, which is contained in the Land Bill 2004. This requirement makes it imperative that the land reform process should not be allowed to stagnate.

Land Inventory Concept

The Land Inventory Concept was developed in 2000 under the Land Management and Administration component of the Agricultural Policy and Capacity Building Project (APCBP). It is a concept for acquiring and storing in a database information about land parcels within the country. It involves the acquisition of graphical and attribute data about all land parcels, but retains the inventory aspect, since it does not involve adjudication and registration. However, the database can be used as a basis for registration under proper legal provisions.

The concept derives its viability from three innovative approaches of the use of Digital Orthophoto Maps, Digital Plane Table (DPT) and the Land Technicians.

Digital Orthophoto Maps

Digital Orthophoto Maps are essentially maps produced from a mosaic of orthogonally projected aerial photographs. This allows the user to identify

visible details on the orthophoto map without expertise in normal map usage. The Land Inventory concepts opts for a digital format to allow digitization of visible boundaries of land parcels in a computer, thus computing the areas of each land parcel. Orthophoto is identified as ideal for this purpose by Dale, who asserts "The use of aerial or satellite photography provides an alternative approach to recording property boundaries. In the case of aerial photography, as with GPS, high-precision measurements can be taken, allowing boundary lines to be measured to an accuracy of a centimeter or so. In order to use such techniques, the boundaries of properties must be visible from the air, either in the form of fence or hedge lines or else as markers on the ground that have been painted in such a way as to make them visible from an aircraft. Aerial surveys have the benefit of economies of scale - the more properties are to be measured at one time, the lower the unit costs; conversely, if only a few boundary points are to be surveyed, the cost becomes relatively high. Aerial photography, however, facilitates the collection of other data, such as land use or the location of topographic features that may be surveyed at minimal additional cost, justifying the greater expense." (Dale, 1999)

Digital Plane Table (DPT)

Digital Plane Table is based on an old mapping technique where a Plane Table, Alidade, Compass and Scale rule were used to produce a map. In Plane Tabling, the map is produced in the field without the recourse to in-office computations and plotting as in other survey techniques. The Digital Plane Table facilitates production of land parcels maps in digital format in the field.

The components of the Digital Plane Table including the following:

- Three sets of Global Positioning Systems (GPS) consisting of two rovers and one base station for determining the coordinates of the points of interest.
- Two Pen-computers linked to the rovers for delineating boundaries visible on the digital orthophoto maps. These are essentially laptop PCs with an onscreen writing facility.
- Penmap software, which simplifies the computation of coordinates of other points of interest which are not identifiable on the orthophoto maps.

Land Technicians

The survey of land parcels for registration purposes (cadastral surveying) is carried out by qualified licensed surveyors, of which there are few within Lesotho, therefore if these were to be engaged to

undertake data capture for the land inventory it would take too long. The land technicians are not professional surveyors, but people trained in the necessary aspects in order to use the DPT and undertake the data capture for the land inventory. The training of land technicians carried out by trained trainers takes three months of lectures, practicals and a final test.

Implementation of the land inventory concept

The proposal under the project was to undertake a feasibility study in a pilot project where digital orthophoto mapping coverage exists. This was not carried out because, although land technicians were trained, the company supplying the DPT went bankrupt and more sets could not be procured. The APCBP came to an end in December 2003, therefore most of the proposals developed under the project will have to be implemented as part of land reform implementation. The digital mapping coverage that is likely to result from the digital agricultural mapping will provide one of the key components for the implementation of the land inventory concept. In supporting the implementation, back in 2000 when the concept was developed, Zuelshof suggests "do what is not forbidden by law", thus implying that the legal framework for this type of land record is not essential for implementation. However, the delay in implementation could mean the legal backing will be in place, as proposed under the Land Bill 2004, when the concept is finally implemented.

MCC Unplanned Settlement Upgrading

The Maseru City Council is again implementing an unplanned settlement upgrading project on the peripheries of Maseru. Similar to the 1988 urban upgrading project, this phase started in the southwest of Maseru. The objective is "...an attempt to achieve an orderly development of the city as against the existing haphazard development that has emerged over the years." (MCC 2002). While the stipulation of the objective does not reflect MCC's enthusiasm about the certainty of success, the community participation in this upgrading of unplanned settlements is the winning element for the implementers, failing which, the coercive or utilitarian power of MCC related to service delivery will be invoked.

The implementation involves registered land surveyors producing detailed maps of areas of settlements, MCC planners proposing roads based on the details maps, and the surveyors demarcating the land parcels as per the new plans, at the same time surveying the resultant sites to cadastral standards, so that the owners can ultimately be issued with leases.

Problems experienced with this approach included the fact that, by the time the MCC planners complete the upgrading proposals for surveyors to set out, the situation on the ground has changed because the people continue to develop new structures. A remedial approach to this problem has been to instruct the land surveyors to do the planning of roads, guided by MCC planning standards, in their areas of work. This aspect of planning has to be done in consultation with the communities, since in most cases it involves reducing the sizes of land parcels in order to provide road accesses.

The affected communities bear the cost of land surveying. Initially the land surveyors were requested to submit proposals, but it was found out that some surveyors had priced themselves too high to perform the required work. After consultation with the Land Surveyors' Association it was agreed that a price of M650?(approx. US\$ 100?) be paid for each land parcel. Payments by individual landowners are made to the Chairman of the Association, who will distribute it to surveyors according to their areas of work. The surveyors find that there are individuals who are reluctant to participate in the project and that there are others who are interested but cannot afford the survey fees.

To encourage the participation of people in these upgrading initiatives, MCC has joined hands with the Water and Sewerage Authority (WASA), whereby under the Maseru Peri-Urban Water Supply project, funded by BADEA, WASA will not provide water connections for those people who do not participate in the upgrading project. This reflects a change of heart from WASA, which initially had a business approach, i.e. that they are in the business of selling water regardless of whether the client has formal or informal title. The change resulted when one of their main pipes was dug out by an informal settler who was building a toilet on his plot and felt that WASA had no right to have a pipe on his land.

The main predicament for all these noble initiatives is the lack of institutional capacity in the formal registration system; as pointed out earlier, it takes from one to five years to acquire a Land Act lease. Currently, applications for leases pertaining to these initiatives by MCC have not been lodged with the Department of Lands, Surveys and Physical Planning (LSPP). This means that when they finally come to LSPP, the system will not be able to handle such an influx of applications. From the land-surveying perspective too, there need to be some discussions to accommodate bulk surveys as opposed to individual plot surveys, where the Chief Surveyors Directions indicates that for every polar fix there needs to be an independent check. Such a discussion would

drastically reduce the examination load.

LAND BILL PROPOSALS

The realism of missing pieces in the jigsaw parcel of creating functioning land records is summarized in the following stipulation: "The 'big picture' needs to acknowledge what global drivers of change exist, understand the current issues in land administration and then begin to substantiate a way forward to facilitate the legal, technical and institutional changes that are necessary in land administration to properly support the sustainable developments objectives." (Grant and Williamson, 1999). The following paragraph highlights key elements of the Land Bill 2004 that are relevant for the creation of land records; however the question of institutional capacity is yet to be addressed in the strategy for implementation of the new land laws.

Principles of Land Bill

The Land Bill 2004 addresses the following four key principles:

Land occupied by citizens and others is held in terms of a lease that derives its legitimacy and legality from the Constitution; this introduces the three types of leases administered at different levels of local government structures and central government.

Land management is devolved from the centre to elected local authorities, operating in a transparent and participatory manner. This will facilitate land allocation and management by local authorities established under the Local Government Act 1997. This will entail institutional changes, which will require extra resource allocation for implementation.

The introduction of transparent and consistent regulation of the land market. The recognition here is that is an informal land market which should be formalized in order to control and protect the contracting parties.

Establishment of an efficient, economical and equitable system of dispute settlement. The proposal here is to introduce specialized courts to address land issues; this is in recognition of a number of pending land cases and development proposals held up due to court cases. In addition, the mediation and arbitration processes are formalized.

Types of leases

Primary leases replace the former allocations of land under the Land Act 1979, which in turn were meant to

replace the customary law land tenure system provided for by the Laws of Lerotoli. The nature and incidents of primary leases on the other hand are clearly spelt out in the Bill: in essence they derive their legality and legitimacy from the Constitution, which vests the power to allocate land and make grants of land in the king "in trust for the Basotho Nation" while providing that the manner and form of the exercise of this power shall be exercised in accordance with the Constitution and "any other law" that is the Land Bill. The foundational or general law which applies to primary leases, i.e. the law behind the Land Bill, is the customary law. The term 'primary' is given to this lease, as it is and will remain for some time to come the primary form of land holding in Lesotho.

Demarcated leases will be the type of leases which citizens may obtain through a process of adjudication of customary law interests in land held for a primary lease. The specific interests which different people have in land held for a primary lease will be fairly fluid and unwritten and the boundaries of the leased land will likewise be 'unwritten' and fluid. Citizens who wish to move towards greater clarity, specifically in relation to their rights in land, may - via a process of the adjudication of rights in land - obtain a demarcated lease to be registered in a local register, and which clearly spells out the boundaries of the land and what rights and subject to what limitations a demarcated lease is held. These leases will be fully marketable and available to be pledged as security for a loan. It will be possible for holders of demarcated leases to move from customary law to Roman/Dutch law as the foundational law of the lease.

Registrable and qualified lease is the existing lease of the Land Act 1979. It is called 'registrable' as it has to be registered in the Deeds Registry. It is granted in respect of land that has been surveyed in accordance with the long-standing principles of surveying. The difference to the existing lease is the introduction of the qualified lease. A qualified lease is a registrable lease but without all the full paraphernalia of final registration. The purposes of a qualified title are to enable land to be alienated in advance of survey and to enable title to be issued in advance of survey (McAuslan, 2003).

Land dispute resolution

The Bill introduces local land courts, district land courts and the national land court for the resolution of disputes on land issues. These will be part of the existing court systems, with special personnel nominated to specialize in land-related issues. Similar arrangements have been introduced for labour courts. In addition, alternative dispute resolution systems are

introduced to provide mediation and reconciliation service. This consists of local mediation panels in the ten districts and a mediator at central level.

Introduction and land market

The bill introduces the land market, providing for transparent and consistent regulation of the land market. From the natural resources perspective, the introduction of a land market is perceived as a catalyst to bring about a mindset change, in which land can be treated as an economic resource and not a free commodity that does not deserve the utmost care and protection. Conversely, some schools of thought see the introduction of a land market as the introduction of social polarization, where land will move from the poor, orphans and disadvantaged groups to the rich and the elites; leading to poverty and social turmoil. The Bill provides for a Land Market Board to ensure that land dealings do not expose the disadvantaged groups to unscrupulous land sharks, or those heads of families who would sell the land disregarding the interests of the heirs to the land. The land disposition will therefore take into account community interest, future generations, orphans and other disadvantaged groups. Other land transactions such as the sub-leasing of agricultural land, sharecropping and others are also catered for and formalized to ensure protection of the contracting parties.

Decentralized land management

Another fundamental land issue is to ensure that land management is devolved from the centre to elected local authorities operating in a transparent and participatory manner. This recognizes the provisions of the Local Government Act 1996, where the land management function is devolved to the local level. The community councils will therefore be responsible for the allocation of land, issuing primary leases and control of land dispositions within their jurisdictions. The Councils will establish standing long affairs committees (SLAC) as sub-committees to oversee the land management issues. At the district level there will be a district land team of technical officers to support the SLACs within the district. The district council will be responsible for reviewing applications in relation to demarcated and registrable leases and the disposition thereof. The urban and municipal councils will be responsible for determining applications for registrable leases.

CONCLUSIONS

The Land Bill 2004 introduces innovations that will go a long way towards addressing the recognition and formalizing of informal settlements in the urban

peripherals. The ongoing proposals by MCC would be accommodated well under the new law, since rather than attempting to issue applicants with registered leases, the qualified leases would suffice. In addition, most of the related records would not necessarily have to be at LSPP level, but the local authority would keep and maintain such records. Digital Agricultural Mapping, if it is implemented, will assist the establishment of the graphic records of land parcels, however rudimentary they may be. Formalising the land market would at the same time imply that there are no illegal settlers, since the land transactions would be properly controlled. This will facilitate the densification of settlements to warrant service provision, because the people would be allowed to subdivide their large land parcels and dispose of the resultant sites.

The major concern will be about the ability to implement the new law. The ability would include the necessary institutional capacity at all levels; the government's will to let go of the ideal environment and let all the informal settlers be formalized as legal, especially when there are many pending cases against some of them, as well as the risk that the settlers whose properties were demolished will sue and seek compensation. The tenure security would be questionable; there may not be doubt between individual transactions for a piece of land, but the financiers would require some state warranting to some of these basis leases which are not registered at the Deeds Registry before issuing a bond on such property. Finally the traditional authorities have no legal role in the new law, which could result in animosities and sabotage from the chiefs; some schools of thought perceive them as being responsible for the dismal failure of the Land Act 1979, which they saw as taking away their birth right of land allocation.

Course for first-year students: National Diploma: Deeds Registration Law



During May 2005 the Sub-Directorate: Deeds Training, at Justice College, hosted the course for first year students enrolled for the National Diploma in Deeds Registration Law. The course was attended by 23 students of whom four students were from the Deeds Registry in Gaborone, Botswana. During the course contact sessions were held with lecturers from Unisa and formal tuition was provided in the practical subjects. During the tests written during the course Mr. CC Hull obtained a mark of 84% in Deeds Registration Law.



The class representative had this to say in her departing speech:

"I would like to thank all the lecturers for their guidance and for doing the impossible, i.e. squeezing the whole year's work into seven days. Although it was a lot of work for us to absorb, we understand the subjects better and we appreciate the assistance afforded.

To the students, it was good to get to know all of you and I know that we are all here because we have a goal of improving ourselves. To achieve this



we need to discipline ourselves and focus on our studies. Make lots of time!

I hope to see all of you here next year. Good luck!"

Recently published Articles and Research

By: A S West - Deeds Training, Pretoria

1. **Journal of South African Law** 2004 (4), page 747
"Abandonment of ownership to property and liability for property tax" - J C Sonnekus
2. **Journal of South African Law** 2005 (1) page 137
"African customary law of intestate succession and gender (in)equality" - Venter and Nel
3. **Obiter** 2004, v.25(2) page 371
"The Mineral and Petroleum Resources Development Act 28 of 2002 and the environment" - P J Badenhorst and R T Steyn
4. **Juta Business Law** 2004 v 12(3) p 132
"Owners liable for tenant's arrear water and electricity consumption charges: issue of a clearance certificate and Section 118 of the Municipal Systems Act" - Michelle Kelly Louw
5. **Butterworths Property Law Update** v 19(1), p 11
"Some disturbing facts on implementing the Communal Land Rights Act" - Maria Ria Nonyana

Books on Conveyancing

By: Claudia Noble - Conveyancer, Johannesburg

Fourie's Conveyancing Practice Guide

Second edition by J Christie

Publisher: Durban: Lexis Nexis Butterworths (2004).
vii and 211pp. Price: R209 (VAT included)
(soft cover).

This book, which records the 145th year old history of the Law Faculty at the University of Cape Town, was published last year to coincide with the university's 175th anniversary.

I can confidently say that Fourie's Conveyancing Practice Guide is indeed an excellent guideline for the practicing conveyancer, and much more. It begins with an introduction to conveyancing, setting out the roles, functions and responsibilities of the conveyancer and paralegal or conveyancing secretary and the basic rules in preparation and lodgment of deeds. It touches briefly on the Deeds Office registration levies and Financial Intelligence Centre

Act (FICA) compliance and has a useful checklist to ensure efficient and productive work.

In Chapter 2, the procedure to be followed in a typical transfer of property is outlined step by step, from opening the file on receipt of instructions to the receipt of an acknowledgement of the title deed after registration. Similarly, the procedures to register a conventional mortgage bond are clearly set out, together with miscellaneous steps in relation to mortgage bonds for which instructions may from time to time be received.

An entire chapter is devoted to the Alienation of Land Act 29 of 2001 and every application, consent or endorsement you may ever need to attend to is covered in Chapter 5. If you have ever felt uncertain when dealing with Certificates of Registered or Consolidated Title, as I have, after reading Chapter 6 you will know exactly 'when' and 'how'.

I am not a notary public and yet the roles, functions and procedures as set forth in Chapter 7 make it so easy to understand that I am motivated to make an attempt to write that exam.

There are a number of miscellaneous forms of transfer such as partition, expropriations, exchange and more, which in the past ten years I have not yet attended to, but if I ever receive an instruction I will know exactly what to do after referring to Chapter 8, which, in addition, covers every aspect of the old time favourite - deceased estates.

I have attended to the establishment of over 30 townships and have found that there is always something different in every one of them. I thus agree with Fourie that the six pages of chapter 9 are nothing more than an overview or, as he puts it, 'a general discussion'.

In the last two years I have opened 26 sectional title schemes for already existing flat complexes and only wish I had had Fourie's guidelines to consult, as I had to learn by trial and error, when I could simply have followed the procedures in Chapter 10 and got it right the first time.

In his final chapter, Fourie provides a number of useful tips on miscellaneous matters.

Of note and certainly the most valuable asset of all is the appendix consisting of 100 precedents.

Oh yes, I almost forgot: in my opinion no practicing conveyancer should be without 'Fourie's Conveyancing Practice Guide'.

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